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No. 81-1839

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
Appellant,

v.

MINNESOTA COMMISSIONER OF REVENUE,
Appellee.

On Appeal From The Minnesota Supreme Court

BRIEF AMICUS CURIAE OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION IN SUPPORT OF JURISDICTIONAL STATEMENT

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BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

INTEREST OF THE AMICUS CURIAE

The American Newspaper Publishers Association (ANPA) is a non-profit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,400 newspapers constituting over 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States. The Minneapolis Star and Tribune Co.'s newspapers, as well as twenty-four other newspapers published throughout the State of Minnesota, hold membership in ANPA.

If the decision of the Minnesota Supreme Court is not reversed, the Minnesota membership of your *amicus* will be adversely affected. Further, if the Minnesota tax statute is found to be constitutional, similar statutes may be enacted in other states, resulting in substantial burdens upon the free press.

ARGUMENT

The Minnesota Newsprint and Ink Tax Is a Discriminatory Tax Against Newspapers in Violation of the First and Fourteenth Amendments.

The Minneapolis Star and Tribune Company has presented in its Jurisdictional Statement a full and accurate discussion of the unconstitutional features of the tax statute challenged in this appeal.[1] ANPA supports the arguments advanced by appellant and will not repeat them here. Our purpose is to stress to this Court that it is the *preservation* of the existing constitutional limitations upon the state's power to tax the press which is at issue in this controversy.[2]

The decision of the Minnesota Supreme Court is a radical departure from the simple, yet irrefutable, principle governing taxation of newspapers. That principle, enunciated in *Grosjean v. American Press Company*, 297 U.S. 233 (1936) and followed in every case since, holds that the press shall bear no greater tax burden than that imposed upon any other enterprise as an ordinary incidence of doing business. Minnesota's narrowly drawn tax, imposed only upon the consumption of paper and ink used in producing regularly-issued publications "for distribution to the general public"[3] is not "an ordinary form of tax, but one single in kind . . ." *Id.* at 250. The evil of this legislation lies in the fact that "being entitled to the advantages granted by the First Amendment, [the press] are singled out and required to pay a special tax that is not required of business in general or some broad portion thereof." *City of Baltimore v. A.S. Abell Co.*, 145 A.2d 111, 118 (Md. 1958).

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[1] Minn. Stat. §297A.14; Minn. Stat §297A.25 subd. 1(i) (1974).

[2] ANPA's discussion herein is limited to that aspect of the statute which discriminates against publishers as compared with all other taxpayers.

[3] *United Hardware Distributing Co. v. Commissioner of Revenue*, 284 N.W. 2d 820 (Minn. 1979).

It must be emphasized that no immunities or privileges for newspapers from laws of general application to their business aspects are asserted here. [4] Rather, it is even-handed treatment for newspaper publishers, guaranteed by the Fourteenth Amendment, which has been denied. And where official discrimination treads upon a First Amendment freedom, the government's burden of justification is especially great.

> When a tax measure is challenged as an undue burden on an activity granted special constitutional recognition, however, the appropriate degree of inquiry is that necessary to protect the compelling constitutional value from erosion.

Austin v. New Hampshire, 420 U.S. 656 (1975).

There can be no doubt that the discriminatory imposition of the use tax here is a direct burden upon the newspapers' function to inform. Newsprint and ink make the dissemination of the news possible and constitute a major cost of publishing.[5] The tax depletes the funds available to a newspaper to gather, print, and circulate the news. The economic viability of a newspaper cannot be separated from its freedom to disseminate information. "The profit motive should make no difference, for that is an element inherent in the very conception of a press under our system of free enterprise." *Cammarano v. U.S.*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

The line between permissible and impermissible taxes upon newspapers is a clear one. In the line of cases following *Grosjean* contesting taxes upon newspapers, each has interpreted its holding to require that a tax against the press *must* be

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[4] *See, e.g., Associated Press v. National Labor Relations Board*, 301 U.S. 103 (1937); *Associated Press v. United States*, 326 U.S. 1 (1945); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946). Nor is this tax objectionable because "it takes money from the pockets" of newspapers or works a hardship upon the appellant. *Grosjean, supra*, at 250.

[5] In statistics compiled by the Newsprint Information Committee, it was determined that in 1980, newsprint alone constituted 32.3% of the total publishing cost of an average daily newspaper with a circulation comparable to that of appellant. Newsprint Information Committee, *Newspaper and Newsprint Facts at a Glance 1980-81* (23rd ed. 1981).

of general application. *See, e.g., Giragi v. Moore*, 64 P.2d 819 (Ariz.), *appeal dismissed*, 301 U.S. 670 (1937) (upholding privilege tax upon all persons engaged in the sale of merchandise or services within the state); *Tampa Times Co. v. City of Tampa*, 158 Fla. 589, 29 So.2d 368, *appeal dismissed*, 332 U.S. 749 (1947) ("In this case City of Tampa has enacted a gross sales tax. Its application is general."); *Arizona Publishing Co. v. O'Neil*, 22 F. Supp. 117 (D. Ariz.) *aff'd* 304 U.S. 543 (1938) (upholding privilege tax "imposed upon a great number of businesses"); and *City of Corona v. Corona Daily Independent*, 252 P.2d 56 (Cal.) *cert. denied*, 346 U.S. 833 (1953) (upholding nondiscriminatory license fee upon "any person, firm, or corporation" engaging in any business in the city).

The essential protection afforded the press by this requirement of nondiscriminatory tax treatment is gravely threatened by the decision below. The direct tax here upon newspapers' raw materials is applicable only to publishing enterprises. The Minnesota Supreme Court's ruling has rendered meaningless the vital constitutional check upon excesses of state power over protected activities.

> . . . [I]f a valid tax be imposed on businesses that do not enjoy any constitutional immunity, the effect of the impact and the oppressiveness of the tax are matters for the legislative conscience to consider; but, when the tax is imposed upon a business that enjoys one of the constitutional immunities of the First Amendment, it must be general in its nature and character and affect this business only incidentally as it affects other businesses in their combined duty to support the government.

City of Baltimore v. A.S. Abell Co., 145 A2d 111, 118 (Md. 1958).

In upholding the Minnesota use tax upon newspapers, the Minnesota Supreme Court acknowledged its obligation to apply the "strict scrutiny" standard of review, required where First Amendment rights may be infringed. (A-8). Contrary to its conclusion, however, that court's analysis of the legislative

scheme failed to show any state interest which warrants this special burden upon the exercise of a fundamental right.[6]

The court cites as the state's most compelling goal that of raising revenues. (A-12). But general revenue needs of the state justify only general revenue-raising measures, through which all businesses will be taxed equitably and uniformly. To defend an exclusive tax upon newspapers on the basis of revenue needs neglects to take into account the historical setting in which the First Amendment was adopted.

An examination of the circumstances preceding and influencing the adoption of the abridgment clause of the First Amendment reveals that it originated partly in reaction to the oppressive British "taxes on knowledge," which unabashedly sought to oppress and restrain the press. *See*, Chafee, *Freedom of Speech*, 32 (1920); Stevens, *Sources of the Constitution of the United States*, 221 (1894). Significantly, in 1785, just four years prior to adoption of the First Amendment, Massachusetts levied a tax upon newspapers "for which there was no evidence ... that this act was anything more than a revenue measure adopted without expectation of unfavorable influence upon the press ..." Duniway, *Freedom of the Press in Massachusetts*, 136 (1906). Yet so strong were the sentiments against taxation of newspapers that the tax was vehemently denounced and repealed in the following year. A 1786 tax on advertising suffered a similar fate. *Id.* at 136. It was these pure revenue-raising measures in Massachusetts which have been attributed directly to the ultimate incorporation of the free press clause in the Federal Constitution. *Grosjean, supra*, at 248 (citing *Pennsylvania and the Federal Constitution* pg. 181 (1888)). This background strongly suggests that a state must demonstrate more than revenue needs alone to satisfy its constitutional burden to show a "compelling state interest" in justifying a special tax upon the press.

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[6] It is firmly settled that "[t]he power to tax the exercise of a privilege is the power to control or suppress its enjoyment." *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943).

The court below further attempts to justify the narrowly targeted use tax on the basis that the legislature sought to offset the publishers' sales tax exemption. (A-12-13). Appellant's Jurisdictional Statement challenges this central premise, on the basis that the aberrant features of the use tax contradict an intention to "compensate" for the sales tax exemption, and in view of the existence of other non-taxed users of paper and ink who are also exempt from the sales tax. The Minnesota Supreme Court's reliance on a compensation theory is unsound for an additional reason. In the absence of any legislative guidance, the Minnesota Supreme Court postulates "this [exemption] may be a result of the difficulties and expense of collecting sales tax upon sales of such low-priced items." (A-13). Your amicus suggest that other, more compelling and plausible bases than that of administrative convenience exist for a sales tax exemption for publications.

The power to exempt, like the power to tax, is one within the legislature's broad discretion, subject to the caveat that such exemptions be enacted for the accomplishment of public purposes for the benefit of the public generally. *United States v. Dept. of Revenue of Illinois,* 202 F. Supp. 757 (N.D. Ill.) *aff'd* 371 U.S. 21 (1962). Without deciding whether a legislature could impose a direct tax upon the sale of newspapers without violating free press guarantees, it is clear that they may exempt newspapers from taxation with the intention of promoting cherished constitutional freedoms. "Legislation to enhance these First Amendment values is the rule, not the exception." *Buckley v. Valeo,* 424 U.S. 1, 93. n. 127 (1976). In order "to secure to the public the benefits to result from the wide dissemination of intelligence as to current events . . . ," the power exists to legislate in favor of publishers. *Lewis Publishing Co. v. Morgan,* 229 U.S. 288, 314 (1912) (discussing statute granting second-class mail privileges to newspapers and other periodicals). A classification which clearly promotes our society's fundamental commitment to a free press should not be used to justify a classification which curtails it.

Sales tax exemptions for publications also may reflect a state's desire to encourage newspaper publishing generally, to

facilitate informed public debate among its citizens. ("The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity . . ." *Grosjean, supra,* at 250.) "[I]t has repeatedly been held and appears to be entirely settled that a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment." *Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 528 (1958).

The legislative record in this case contains no support for the Minnesota Supreme Court's speculative premises concerning the state's intent either with regard to the sales tax exemption, incorporated into the original statute, or with regard to the use tax, levied only upon the state's largest newspapers. The nature and effect of these provisions counsel against the court's hypotheses.[7] Absent evidence of a specific and substantial state interest served, this arbitrary and unjust use tax classification is an invalid infringement upon the affected, and protected, activity.

This Court is respectfully urged to overturn the decision below or accept this case for full review. If permitted to stand, the decision of the Minnesota Supreme Court will set a disturbing new precedent regarding a state's ability to curb expressive activity through discriminatory taxation. The First Amendment prohibits a state from singling out the purveyors of information and forcing them to bear a disproportionate share of the public expense, thus assuring the public the benefits of an unfettered press.

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[7] "[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger v. Wiesenfeld,* 420 U.S. 636, 648 (1975).

CONCLUSION

It is respectfully submitted that this Court enter an order noting probable jurisdiction in order that the substantial constitutional questions raised by this appeal can be fully examined.

Respectfully submitted,

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March 2, 1982

Mr. W. Terry Maguire, Vice President
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American Newspaper Publishers Association
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Re: Minneapolis Star and Tribune Company
Minnesota Tax on Newsprint and Ink

Dear Mr. Maguire:

This letter will confirm that appellant Minneapolis Star and Tribune Company consents to the appearance of the American Newspaper Publishers Association as *amicus curiae* in the above appeal before the United States Supreme Court.

Sincerely,

/s/ LAWRENCE C. BROWN

Lawrence C. Brown

LCB/mag

cc: Norton L. Armour

March 9, 1982

Mr. Terry Maguire
Vice President/General Counsel
American Newspaper Publishers Association
The Newspaper Center
Box 17407
Dulles International Airport
Washington, D.C. 20041

Re: Minneapolis Star & Tribune Co. v.
Commissioner of Revenue
U.S. Supreme Court No. _____

Dear Mr. Maguire:

Please be advised that the Commissioner of Revenue has no objection to the American Newspaper Publishers Association filing briefs as *amicus curiae* in the above matter.

Very truly yours,

WARREN SPANNAUS
Attorney General

/s/ PAUL R. KEMPAINEN

Paul R. Kempainen
Special Assistant
Attorney General
ATTORNEYS FOR COMMISSIONER
OF REVENUE

PRK:dw